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Statement of Facts

Mr. Adrian D. Meyer (hereinafter referred to as “Father”), an active duty serviceman in the United States Air Force, is the father of 12-year-old Brett Alexander Meyer. Transcript at 7 (hereinafter referred to as “TR”). Father was formerly married to Ms. Melissa E. Pirisky (hereinafter referred to as “Mother”), but their marriage was dissolved in 1994. (TR, 6). At that time, Mother lived in the area around Cape Girardeau, Missouri, and as a part of the Decree of Dissolution of Marriage, Mother was awarded “primary custody” of Brett with visitation rights reserved for Father. (TR, 6-8). Unfortunately, the Decree only set forth a specific visitation schedule for up to the time Brett reached the age of five years. Legal File at 13 (hereinafter referred to as “L.F.”) Beyond that age no specific schedule was provided. (L.F. 13)

Five months after the issuance of the Decree, in October 1994, Father was forced to file a contempt action against Mother as a result of her refusal to comply with the visitation terms of the Decree issued earlier that year. (TR, 8-9). Judge William L. Syler enforced Father’s right to exercise visitation with his son. (TR, 9). Following this visitation period, Father was stationed at Osan Air Force Base in South Korea for one year. (TR, 8-9).

Upon returning from Korea in 1995, Father was stationed for a three-year period at Nellis Air Force Base in Nevada. (TR, 9-10). By that time, Mother had moved and was living with Brett in Tucson, Arizona. (TR, 10). Then, in 1998, the Air Force relocated Father to Sheppard Air Force Base, near Wichita Falls,

Texas, where he remained until 2002. (TR, 11). For the most part during this collective seven-year period, Mother permitted Father to visit regularly with Brett. (TR, 10-11).

In 2002, after being selected to attend officer training school, Father was reassigned to Maxwell Air Force Base, Alabama, and subsequently transferred to Aviano Air Base in Italy in July of 2002. (TR, 12). In the summer of 2002, before Father was transferred to Italy, Father's current wife of nearly ten years, Cynthia Meyer, arranged by phone for Mother to fly Brett to St. Louis, Missouri, where Cynthia would pick him up for a 34-day visitation period. (TR, 12-13). Mother agreed to this plan, and Brett spent his first ten days of visitation alone with Cynthia and another of Father's sons from his marriage with Cynthia. (TR, 12-13). After Father graduated from officer training school, he joined Brett, Cynthia, and his other son as they vacationed through Indianapolis, Washington D.C., and Baltimore for the next 24 days. (TR, 12-13). At the end of the 34-day visitation period, sent Brett back to Mother in Arizona and flew with Cynthia and their son to Italy. (TR, 12-13).

Upon moving to Italy in July 2002, Father learned that Brett had expressed his interest in living with Father. (TR, 14-15). At that point, Mother blocked Father from communicating with Brett. (TR, 15). Mother refused to sign for and accept the letters and packages that Father sent to Brett by post. (TR, 15-16). Mother also blocked Father from e-mailing and calling his son. (TR, 16-18). Father returned to the United States for the month of October 2002, to continue his

training at Maxwell Air Force Base, Alabama. (TR, 19). Despite Father's many attempts to communicate with Brett during this month-long stay, Mother refused to allow Father to contact his son. (TR, 19-20). In 2003, when Father spent four and a half months in Texas for a training course, Mother continued to deny Father's attempts to contact Brett. (TR, 20). During this time spent in Texas, Father purchased a airplane ticket for Brett to fly from Phoenix to visit Father in Texas so that Father could exercise his Easter break visitation rights; however, Mother refused to allow Brett to board the plane. (TR, 20-21). Subsequently, Father filed an action before Judge Syler to modify the visitation of the Decree of Dissolution of Marriage in order to obtain a specific visitation schedule and was granted that modification, which included summer and Christmas visitation rights. (TR, 21-23). Despite Judge Syler's order, Mother refused to grant Father his summer visitation with Brett. (TR, 23).

Father registered the Missouri Judgment in Arizona and filed a second contempt action against Mother to enforce Judge Syler's order. Mother attempted to block this enforcement by filing a motion requesting that the Arizona court assume jurisdiction over the case. (TR, 24). The Arizona court refused to assume jurisdiction over the matter other than to allow registration of the Missouri Decree and to enforce and uphold Judge Syler's previous orders. (TR, 23-24). Finally, after the Arizona Court upheld Judge Syler's visitation order, Mother flew Brett to Missouri so that Father could enjoy his court-ordered Christmas visitation with his son over Christmas while Father was home in Missouri. (TR, 25). At the end of

that Christmas visitation, Father allowed Brett to board a flight to Arizona to return to Mother. (TR, 25).

In total, Mother cut Father off from contact with Brett for 18 months. (TR, 28). Judge Syler's response was to schedule a January 2004 hearing for Father's motion to modify the child custody provisions of the Decree. (TR, 36-37). Mother was served personally with the Motion to Modify on November 10, 2003. She did not respond to that Motion (either pro se or through counsel) prior to receiving on December 27, 2003, notice of the hearing of that Motion other than to request an extension of time, which was denied by the Court on December 17, 2003 (L.F. 6). Mother failed to appear for the hearing, which was held on January 6, 2004, and she failed to hire an attorney to appear on her behalf. (TR, 45-47). After hearing evidence, Judge Syler issued a Modification Judgment, granting Father "primary custody" of Brett. (TR, 34-35). Currently, Father remains based in Italy until his tour there ends in 2005. (TR, 31).

Points Relied On

I. The Trial Court's finding of subject matter jurisdiction to hear Father's motion to modify child custody was correct because Missouri law provides Missouri courts with subject matter jurisdiction to hear cases involving child custody where at least one parent and the child involved have significant connections with Missouri in that Father's status as a Missouri resident satisfies the requirement of significant connections to the State.

Dobbs v. Dobbs, 838 S.W.2d 502 (Mo. App. E.D. 1992).

Lydic v. Manker, 789 S.W.2d 129 (Mo. App. S.D. 1990).

Edwards v. Edwards, 709 S.W.2d 165 (Mo. App. E.D. 1986).

II. The Trial Court’s decision to deny Mother’s motion to set aside judgment was correct because Missouri law provides trial court judges with the discretion to set aside their judgments upon a party’s request to do so within 30 days of the judgment and upon a showing of (1) “good cause” or (2) “excusable neglect” in that (1) Mother failed to show “good cause” for setting aside the judgment and (2) Mother failed to present evidence of “excusable neglect” for her absence from the Circuit Court of Cape Girardeau County for the January 6, 2004, motion to modify trial.

Klaus v. Shelby, 42 S.W.3d 829 (Mo.App. E.D. 2001).

Stradford v. Caudillo, 972 S.W.2d 483, 486 (Mo. App. W.D. 1998).

Gibson v. White, 904 S.W.2d 22 (Mo.App. W.D. 1995).

Argument

I. The Trial Court’s finding of subject matter jurisdiction to hear Father’s motion to modify child custody was correct because Missouri law provides Missouri courts with subject matter jurisdiction to hear cases involving child custody where at least one parent and the child involved have significant connections with Missouri in that Father’s status as a Missouri resident satisfies the requirement of significant connections to the State.

A. Standard of Review

A trial court’s authority conferred by §§ 452.440 – 452.550 to hear a child custody determination is known as subject matter jurisdiction. *Elbert v. Elbert*, 833 S.W.2d 884, 887 (Mo. App. E.D. 1992). While the circumstances upon which a trial court bases its subject matter jurisdiction must exist at the time that the court invokes jurisdiction, *State ex rel. Phelan v. Davis*, 965 S.W.2d 886, 890 (Mo. App. W.D. 1998); a party may challenge subject matter jurisdiction for the first time on appeal. *Jew v. Home Depot USA, Inc.*, 126 S.W.3d 394, 397 (Mo. App. E.D. 2004).

B. The Circuit Court had subject matter jurisdiction to preside over Father’s motion to modify.

Father satisfied his burden of proving that the Circuit Court of Cape Girardeau County had subject matter jurisdiction to hear his motion to modify. The four possible bases on which a Missouri court may assume jurisdiction to hear a child custody case are the following: “(1) the home state, (2) significant

connections, (3) emergency, and (4) default or vacuum.” *Bates v. Jackson*, 28 S.W.3d 476, 478-79 (Mo. App. E.D. 2000) (interpreting R.S. MO. § 452.450.1). Subsection (2) of § 452.450.1 provides that Missouri courts have jurisdiction to modify child custody determinations if the following is established:

It is in the best interest of the child that a court of this state assume jurisdiction because:

- (a) The child and his parents, or the child and at least one litigant, have a significant connection with this state; and
- (b) There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

RSMo. § 452.450.1(2).

Interpreting this provision, the Missouri Court of Appeals, Eastern District, has determined that, despite the fact that the children involved live in another state, Missouri retains “preferential jurisdiction to hear subsequent custody and visitation matters” where a Missouri court renders the original dissolution of marriage decree, which includes custody arrangements, and one parent continues to reside in Missouri. *Dobbs v. Dobbs*, 838 S.W.2d 502, 503-04 (Mo. App. E.D. 1992). *See also Newton v. Newton*, 811 S.W.2d 868, 869 (Mo. App. E.D. 1991) (holding that the residence of a mother and her children in a state other than Missouri, where the father lives, is insufficient “to deny the Missouri courts subject matter jurisdiction”); *Lydic v. Manker*, 789 S.W.2d 129, 131-32 (Mo. App. S.D. 1990). “If the evidence establishes that the jurisdictional requirements of § 452.450 were met, the court’s judgment must not be declared void.” *Miller v. Robinson*, 844 S.W.2d 574, 579 (Mo. App. W.D. 1992). In the instant case, the

Missouri court rendered the original Decree and two subsequent orders prior to the Judgment that is the subject of this appeal. Father continued to reside in Missouri. Therefore, the Missouri court retained such “preferential jurisdiction.”

Father is a resident of Missouri, despite the fact that he is currently stationed in Italy. A parent’s military status, which requires his or her presence in other states or countries, does not affect the parent’s legal residence where the parent has not abandoned his or her domicile in the state of claimed residence and the party challenging the parent’s residency has produced no convincing evidence to the contrary. *Edwards v. Edwards*, 709 S.W.2d 165, 167-68 (Mo. App. E.D. 1986). “The residence of one in military service generally remains unchanged though he or she may be stationed in the line of duty at a particular place even for a period of years.” *Id.*

Further, the time that the minor child spent with Father outside of the state of Missouri during the Father’s military service strengthens the connection with Missouri. The Eastern District Court of Appeals in the above case found subject matter jurisdiction over a child who was living overseas with an active duty military mother whose “residence” was determined to be Missouri. The child was considered to be “domiciled” in Missouri when with the mother because of the Mother’s Missouri residency. Therefore, using this analysis, the time that Brett has spent with Father during his father’s military service, while his father has been a resident of Missouri, must be legally considered to be as though domiciled in Missouri.

Dobbs, *Newton*, and *Lydic* demonstrate that Missouri Courts consider one parent's continued residence in Missouri, where a previous child custody determination has been made, to establish first the necessary significant connection, and then a finding of subject matter jurisdiction for Missouri courts regardless of the fact that the child or children in question live outside the state. All three cases involved litigants who had received marriage dissolution decrees from Missouri courts prior to the filing of the appealed child custody actions. *Dobbs*, 838 S.W.2d at 503; *Newton*, 811 S.W.2d at 868; *Lydic*, 789 S.W.2d at 130. Furthermore, all three cases involved mothers who had moved from Missouri, taking their children with them. *Dobbs*, 838 S.W.2d at 503; *Newton*, 811 S.W.2d at 868; *Lydic*, 789 S.W.2d at 130.

In *Dobbs*, the Eastern District Court of Appeals concluded that the trial court had subject matter jurisdiction to hear and grant a modification of child custody upon finding that the father had continued living in Missouri after a Missouri court entered his marriage dissolution decree. 838 S.W.2d at 504. Likewise, in *Newton*, the father's residence in Missouri justified subject matter jurisdiction for a Missouri court, even though the mother and children lived in Illinois when the father filed his motion to modify. 811 S.W.2d at 868. Notably, the *Dobbs* and *Newton* Courts found that significant connections existed without detailing any contacts that the children had maintained with the state after moving out of Missouri. *Dobbs*, 838 S.W.2d at 503-04; *Newton* 811 S.W.2d at 868-69.

The holdings in *Dobbs* and *Newton*, emphasizing that one parent's residency in Missouri is sufficient to justify jurisdiction for a Missouri court, suggest that those courts, like the *Lydic* Court, find a significant connection jurisdiction "in the state of the prior decree where the Court record and other evidence exists and where one parent or another contestant continues to reside." 789 S.W.2d at 131 (quoting *Kumar v. Super. Ct. of Santa Clara Cty.*, 652 P.2d 1003 (Cal. 1982)).

In arriving at its decision that subject matter jurisdiction was available to the trial court, the *Lydic* Court reasoned that the "[r]espondent is the father of the three children who are the subject of this proceeding[;] [t]herefore, one litigant (respondent) and each of the three children have significant connections with [Missouri]." *Id.* at 132. Additionally, the *Lydic* Court relied on the availability of records of the parents' dissolution of marriage, the children's education, and testimony of the children's Missouri relatives to satisfy the "substantial evidence" requirement and justify its finding of jurisdiction. *Id.* In the instant case, Judge Syler clearly relied heavily upon the records available to the Court in Missouri regarding the three previous cases involving the parties which had been decided in Missouri. The record in the case also demonstrates that the father and his relatives are available in Missouri to provide evidence to the court. In fact, arguably, the prior record of Mother before the Missouri Court may be just what she was trying to avoid in seeking a clean start before a judge in Arizona.

Similar to the *Dobbs*, *Newton*, and *Lydic* scenarios, Mother and Father received their dissolution decree, a contempt order, and a previous modification judgment in the Missouri courts before the current dispute arose. And, like the fathers in *Dobbs*, *Newton*, and *Lydic*, Father has maintained his residence in Missouri since the initial decree was rendered. Father's Missouri residency and his relationship as father to Brett Alexander Meyer establish this as a classic case of significant connection jurisdiction in line with *Dobbs*, *Newton*, and *Lydic*. The Circuit Court of Cape Girardeau County properly relied on the Missouri court records of prior decrees received by the Mother and Father, in the same way that the *Lydic* Court appropriately chose to support its finding of jurisdiction with dissolution decree record of the litigants involved there. Judge Syler reflected as to his familiarity with Mother through his experience with her when stating, "I have the impression here, looking at this file and thinking back on what I've heard and learned in the past and correspondence that's in here and the pleadings, that Ms. Pirisky is actually working the system." (TR, 49).

Although the Missouri courts retain "preferential jurisdiction," Father acknowledges that in some cases this preference has been overcome. However, those cases can be distinguished from the instant case. For example, the facts of the instant case cannot be compared to the case of *Timmings v. Timmings*, 628 S.W.2d 724 (Mo. App. E.D. 1982). In that case the father was a resident of the State of Illinois when he filed his Motion to Modify (and the mother and child were Iowa residents). Father "held off" service until the date that he

“clandestinely” moved with the child back to Missouri. The Father in the instant case remained a Missouri resident from the day that the marriage of the parties was dissolved.

Similarly, in the case of *Payne v. Welker*, 917 S.W.2d 201 (Mo. App. W.D. 1996), the mother and child resided in Maryland at the time the dissolution action was filed, but the parties agreed to a custody order through the Missouri court. However, the Court would not subsequently hear a contested custody modification action, recognizing that the child was not even a resident of Missouri at the time of the dissolution, and had not been a resident thereafter. Importantly, this case does not indicate that the Missouri court had the same history with the parties as in the instant case where the Missouri court has heard two other matters involving the minor child since the original dissolution action.

Mother’s reliance on *Elbert v. Elbert* is unfounded because that case is distinguishable to the extent that it involved litigants whose original divorce decree was entered in Ohio rather than Missouri. 833 S.W.2d 884 (Mo. App. E.D. 1992). Moreover, the majority of Mother’s Brief, in the argument section for Point I, which is devoted to explaining the inapplicability of § 452.450.1(4), is irrelevant to the extent that Father seeks to invoke subsection (2), rather than subsection (4), to establish jurisdiction.

Father acknowledges that in addition to meeting the significant connection requirement, the trial court must also have “optimum access to relevant evidence” regarding the best interests of the child. See *Timmings*, 628 S.W.2d at 726-727.

The instant case is one involving a change of custody. The courts have held that what is in the best interests of the child is of paramount concern in determining child custody. *Ficker v. Ficker*, 62 S.W.3d 496, 499 (Mo. App. E.D. 2001).

The Trial Court was required to consider the relevant factors set forth in Section 452.375.2 (1) – (8) in order to make its determination regarding the best interests of the child. These factors establish the “relevant evidence” that the Trial Court must have available to it in order to properly make a determination regarding custody. The record in this case clearly establishes that the Missouri trial court is indeed the appropriate forum to determine the best interests of Brett, applying those factors and considering the relevant evidence available to Court.

In examining the relevant factors, and the evidence available to the Court, evidence regarding the wishes of the parents, the first statutory factor was available to the Trial Court in Missouri. The Missouri Court also had available to it evidence relating to the second factor, the needs of the child as to a frequent and meaningful relationship with both parents and the parents willingness to perform their functions. This factor weighs in favor of retaining jurisdiction with the experienced court in Missouri. The child has parents and relatives who reside in both Missouri and Arizona. Therefore, the third factor favors neither jurisdiction. The fourth factor relating to which parent will likely allow frequent, continuing and meaningful contact favors the “preferential jurisdiction” being retained in Missouri. Only the fifth factor relating to the child’s adjustment to home, school and community favors the foreign state – although evidence regarding that

adjustment can surely be available to the Court in Missouri. The final applicable factor regarding the wishes of the child favors neither jurisdiction.

The “relevant evidence” that must be available to the Trial Court is not evidence regarding the minor child, but as the factors above clearly indicate, is “evidence about the child and family.” *Timnings* at 727. That evidence in the instant case, much to the dismay of Mother, was known by and available to Judge Syler in Cape Girardeau County.

The Court in the *Dobbs* case also recognized that although the necessary significant connection exists in the State of Missouri another state may also have enough contact with the child to have “concurrent” jurisdiction. However, the Court held that the existence of those significant connection between the child and another state were not held to eliminate the subject matter jurisdiction that exists as a result of the recognized significant connection between the parent and the State of Missouri.

As *Edwards* establishes, Mother’s assertion that Father should be denied his status as a Missouri resident because of his military service is offensive and patently wrong. Like the mother in *Edwards*, who left Missouri only to join the Air Force, Father’s absence from Missouri is purely a result of military orders. (TR, 8-15). Therefore, Mother’s claim that Father “has no significant connections with Missouri” is unfounded and should be rejected.

In addition to the significant connections, substantial evidence was available and was presented to the Trial Court in order to allow the court to

determine that a transfer of custody was in the best interests of the minor child. Relevant evidence about the minor child and his family, necessary to determine the best interests of the child, were available to the Trial Court. The statutory requirements for subject matter jurisdiction have been met.

II. The Trial Court’s decision to deny Mother’s motion to set aside judgment was correct because Missouri law provides trial court judges with the discretion to set aside their judgments upon a party’s request to do so within 30 days of the judgment and upon a showing of (1) “good cause” or (2) “excusable neglect” in that (1) Mother failed to show “good cause” for setting aside the judgment and (2) Mother failed to present evidence of “excusable neglect” for her absence from the Circuit Court of Cape Girardeau County for the January 6, 2004, motion to modify trial.

A. Standard of Review

A trial court may act with broad discretion in determining whether to grant or deny a motion to vacate a judgment, and an appellate court may not reverse such a decision unless, by a showing of clear and convincing evidence, it is proven that the trial court abused its discretion in making its decision. *In re Marriage of DeWitt*, 946 S.W.2d 258, 260-61 (Mo. App. W.D. 1997). An abuse of discretion has occurred where a trial court’s decision is “clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id.* (quoting *Bowman v. McDonald’s Corp.*, 916 S.W.2d 270, 276 (Mo. App. W.D.

1995)). However, a reviewing court will find that no abuse of discretion occurred if reasonable minds could differ as to the appropriateness of the trial court's decision. *State ex rel. Webster v. Lehdorff Geneva, Inc.*, 744 S.W.2d 801, 803 (Mo. banc 1988).

B. Mother did not established “good cause” to warrant the setting aside of the Circuit Court’s modification judgment.

The trial court correctly denied Mother’s motion to set aside judgment because Mother has failed to show “good cause” for a new trial under either Rule 75.01. Good cause encompasses the occurrence of mistakes or conduct that is not intentionally or recklessly designed to impede the judicial process. *Brueggemann v. Elbert*, 948 S.W.2d 212, 214 (Mo.App. E.D. 1997). Recklessness involves some element of deliberateness and of risk. *Id.* In this context, the concept of recklessness has been discussed as follows:

To be reckless, a person makes a conscious choice of his course of action, "either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man."

Gibson by Woodall v. Elley, 778 S.W.2d 851, 854 (Mo.App. W.D. 1989) (citing *Farm Bureau Town & County Ins. Co. v. Turnbo*, 740 S.W.2d 232, 235 (Mo.App. E.D. 1987)). “[C]onduct...[that] amounts to a conscious choice to ignore summons, could accurately be called recklessness.” *Stradford v. Caudillo*, 972 S.W.2d 483, 486 (Mo. App. W.D. 1998). As stated in *Brueggemann*, “The setting aside of a judgment is traditionally within the discretion of the trial court, and that

ruling will not be interfered with in the absence of an abuse of discretion.” 948 S.W.2d at 214.

Although Mother was not technically in default in this case simply because no responsive pleading was required on her part, the “good cause” requirement of Rule 74.05, dealing with default judgments, is identical to that of Rule 75.01. See, e.g., *Young v. Safe-RTRe Services*, 23 S.W.3d 730, 732 (Mo.App. W.D. 2000). See *Cramer v. Carver*, 2004 WL 115159 (Mo.App. W.D. 2004). In *Klaus v. Shelby*, the Missouri Court of Appeals discussed the issue of what constitutes “good cause” to set aside a default judgment. 42 S.W.3d 829 (Mo.App. E.D. 2001). In that case, the plaintiff obtained a default judgment against the defendant. *Id.* at 830. Ten days after the default judgment was entered, the defendant’s attorney filed a motion to set aside the default judgment. *Id.* The only “good cause” cited in that motion was the fact that the defendant’s attorney did not receive notice of the lawsuit until after the default judgment was entered. *Id.* The trial court granted the defendant’s motion to set aside the default judgment. *Id.* at 830-31. However, the Court of Appeals reversed under an abuse of discretion standard of review. *Id.* at 830. The Court of Appeals held that the defendant failed to state “good cause” for setting aside the judgment because he had provided no explanation as to why he “failed to hire an attorney, file a responsive pleading, or take any affirmative action prior to the default.” *Id.* at 832.

Stradford demonstrates the sort of conduct that the Eastern District Court of Appeals does not accept as establishing good cause. There, the defendant-driver

of a car that struck and injured the plaintiff-victim appealed a default judgment entered against her after she failed to file an answer and failed to appear for a scheduled hearing to determine damages. 972 S.W.2d at 484-85. The driver did not hire an attorney in that case until months after her answer period had terminated, and the driver chose not to attend the trial court's hearing even though she had received notice of it by certified mail. *Id.* at 484. The *Stradford* Court rejected the driver's arguments that her lack of money, insurance and lawyer constituted good cause. *Id.* at 486. Furthermore, that Court characterized the driver's decision to ignore its judicial proceeding to be an act of "reckless disregard of the rules and procedures set out for the orderly administration of the judicial process." *Id.*

As in *Klaus* and *Stradford*, Mother made no showing of good cause on which the trial court could have justified granting her motion to set aside its judgment. There is ample evidence that Mother was well aware of her obligation to respond to Father's motion to modify filed in this case. Like the *Stradford* driver, who received notice of her hearing by certified mail, Mother was personally served a copy of Father's motion to modify on November 10, 2003, which was 57 days before the trial actually took place. (TR, 48). The record reflects that on December 30, 2003, aware that her request for additional time had been denied by Judge Syler, Mother signed a consent (hereinafter referred to as "Consent") to the withdrawal of her attorney from representing her in a contempt

action that Father filed in Arizona. (TR, 45-46). In the Consent, Mother attests the following:

I understand . . . that my former husband has filed a Motion for Change of Custody in Cape Girardeau, Missouri Circuit Court . . . that I can either represent myself or retain Missouri counsel to represent me in that pending Missouri custody matter; that if I do not respond in a timely manner to the Petition for Change of Custody, that the Missouri court may take a default judgment against me .

(TR, 45-46).

The record also reflects that Mother was informed by an Arizona court of her responsibility to either appear in Missouri for Father's motion to modify or hire an attorney to appear there on her behalf. (TR, 45). Like the *Klaus* defendant and the *Stradford* driver, both of whom chose not to hire attorneys to represent them in their respective scheduled court appearances, Mother chose to hire Arizona counsel and pursue efforts to attempt to block the Missouri litigation through the Arizona courts. Her only responses to the Missouri litigation for a period of almost two months were requests for delays. Mother chose not to take action in her defense in Missouri, even though she was advised of her responsibility to do so by both an Arizona judge and an Arizona lawyer in addition to, and even after receiving, the Court's notice on December 27, 2003. *Id.* at 36-37. Moreover, Mother's claimed lack of resources should be rejected as not providing support for a finding of good cause, in the same way that the *Stradford* Court treated the *Stradford* driver's claim that she had no money as no excuse for the driver's decision to ignore that Court's proceedings and as stated above, she

was actively utilizing resources to prosecute actions against Father to block the Missouri action in Arizona. Instead, Mother was taking a conscious risk that the Arizona Court would assume jurisdiction of this matter, and she must accept the consequences of that decision. As Judge Syler stated in his ruling, on the post-trial motion, he recognized that Mother was delaying through inaction in an effort to postpone the case beyond the time the military Father was home from Italy to be in Missouri for a Christmas leave, reflecting that this conduct was similar to his experience during the 1994 contempt action. (TR, 8, 49-50).

Mother's conduct in this case recklessly impeded the judicial process. Just as the *Stradford* Court considered the driver in that case to have acted with reckless disregard for the judicial process by failing to appear for a hearing; Mother's deliberate disregard of the possibility that a judgment would be entered against her amounts to recklessness. Therefore, under Rules 75.01 and 78.01, she cannot establish that she has "good cause" to have the Judgment set aside.

Mother's interpretations of *BLC(K) v. WWC* and *Brueggemann v. Elbert* are incorrect. The holdings in the *Brueggemann* case support Father's position. The instant case cannot be compared to an innocent scheduling mistake on the part of an attorney. The *Brueggemann* Court specifically recognized that there was no "element of deliberateness and risk." As stated above, Mother made the decision, after being served with the Missouri motion, to pursue the Arizona litigation diligently and risk adverse action in Missouri. This deliberate action on her part

distinguishes her from the mistaken attorney who calendared his hearing at the wrong time in the *Brueeggemann* case.

It appears that, in her brief, Mother has attempted to construe *BLC(K) v. WWC* as a case which holds that good cause for setting aside a judgment exists anytime a custody contest is involved. If, indeed, this does reflect Mother's interpretation of the *BLC(K)* holding, her reading of the case is clearly incorrect. *BLC(K)* is a case, which happens to involve a child custody contest, where the trial court decided on its own initiative to set aside its original judgment and reopen the case to receive more evidence. 568 S.W. 2d 602, 604 (Mo.App. 1978). Despite this decision, the *BLC(K)* case in no way goes so far as to hold that good cause for setting aside judgment exists merely because a case involves a child custody contest. *BLC(K)* simply stands for the principle that when the facts of a case represent good cause for setting aside a judgment, a trial court may choose to do so. *Id.* In the present case, however, no such good cause exists.

C. Mother did not establish that “excusable neglect” occurred so as to warrant the setting aside of the Circuit Court’s modification judgment.

Rule 74.06(b) allows a party to seek relief from a final judgment for excusable neglect. For purposes of this rule, "excusable neglect" is defined as:

Failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

Gibson v. White, 904 S.W.2d 22, 25 (Mo.App. W.D. 1995) (citing Black's Law Dictionary 566 (6th ed.1990)). A finding that no “excusable neglect” occurred is appropriate where a party’s failure to appear or hire an attorney to appear on her behalf is consistent with that party’s long history of delaying court proceedings. *DeWitt*, 946 S.W.2d at 262.

DeWitt demonstrates the unwillingness of Missouri courts to grant a motion to set aside judgment where a party has repeatedly acted so as to delay the judicial process. There, the Western District Court of Appeals reversed a lower court’s decision to grant a father’s motion for relief from a judgment against him where the father failed to appear for a court hearing and failed to hire an attorney to appear on his behalf. *Id.* at 260-61. Like in the instant case in which the court received a letter from Mother’s Arizona lawyer, who was not an actively licensed Missouri lawyer, on her behalf (TR, 44-46), the father’s counsel in Florida began sending letters to the court explaining that the father was recovering from surgery and did not have the funds to attend the hearing in Missouri. 946 S.W. 2d at 260. However, the father’s Florida counsel did not enter an appearance in the Missouri court; therefore, when the court’s hearing date arrived with no formal motion for continuance on file nor any appearance by the father or an attorney on his behalf, the trial court entered a child support modification judgment and a judgment of sanctions against the father. *Id.* at 260.

The Court of Appeals found that the lower court’s decision to grant the father’s motion to set aside judgment was an abuse of discretion. *Id.* at 259, 262.

The *DeWitt* Court rejected the father's arguments regarding his alleged financial concerns that had prevented him from appearing at the Missouri court hearing, noting that the father could have hired counsel to appear on his behalf just as the father had done in order to file his motion to set aside judgment after missing the hearing. *Id.* at 262

Like the *Dewitt* father, here, Mother's multiple delays of the Missouri judicial process and failure to appear or hire a Missouri lawyer on her behalf warrants a finding that no excusable neglect occurred. Mother misleadingly argues that her inability to "travel across the country on just eleven days notice" before the January 2004 hearing constitutes excusable neglect; however, this argument ignores the fact that Mother was served with Father's motion to modify on November 10, 2003. (TR, 48). Much like the *DeWitt* father, who did not hire a Missouri lawyer until judgment was entered against him, Mother took absolutely no action to hire an attorney in Missouri or otherwise appear in this case until after the Judgment was entered against her 57 days after notice was served. Likewise, Mother's excuses concerning financial difficulties and time constraints should be disregarded in the same way that the *DeWitt* Court found that father's attempts to justify his absence from the hearing to be unconvincing. Furthermore, just as the *DeWitt* father both had the assets to hire an out-of-state Florida lawyer and to hire a Missouri attorney after a judgment was filed against him demonstrated his ability to acquire representation, Mother's decision to employ an Arizona lawyer and employ a lawyer in Missouri to file her motion to set aside judgment only 18 days

after the modification judgment was filed shows that she was capable of obtaining representation in Missouri on short notice, as well. (L.F. 7).

Under these circumstances, Mother's conduct amounts to "willful disregard of the process of the court." *Gibson*, 904 S.W.2d at 25. Furthermore, she has not pointed to any "unexpected or unavoidable hindrance or accident" that prevented her from appearing in this case. *Id.* Much like the *DeWitt* Court's view of that father's multiple delays of the judicial proceedings and the multiple contempt actions filed against him, Judge Syler considered Mother's failure to attend the January 2004 trial in the context of his nearly ten-year experience of hearing matters related to Mother and Father's divorce and child custody rights to be illustrative of Mother's continuing efforts to manipulate the legal system so as to prevent Father from enjoying his visitation rights. (TR, 49-50). In denying Mother's motion to set aside judgment, Judge Syler explained the following:

[Mother] is actually working the system;...she has taken advantage of the fact that her former husband lives out of the country because he's in the service and has limited opportunities to come and have his visitation, and that she does just enough to bump things along, and then when time is elapsed, then she has nothing to worry about [until] the next time [Father] comes back, and I think [Mother has] played the system once again.

Id. In light of Judge Syler's recognition of Mother's manipulative actions and the fact that the January 2004 trial for Father's Motion to Modify was the third time that the Cape Girardeau County Circuit Court had ruled on Mother's failure to adhere to its Order requiring that Father receive visitation rights, *id.* at 34-35, it is clear that Mother's failure to appear before Judge Syler or to hire a lawyer to

appear on her behalf for the January 2004 trial was motivated by Mother's desire to keep Father from visiting with his son, Brett Alexander Meyer. Therefore, Mother has failed to demonstrate "excusable neglect" as required by Rule 74.06.

Conclusion

As explained above, the Trial Court properly assumed subject matter jurisdiction in hearing Father's Motion to Modify, and Mother failed to demonstrate good cause or excusable neglect for which the Trial Court could have set aside its original Judgment; therefore, Father respectfully requests that this Court affirm the judgment of the trial court.

**CERTIFICATE OF SERVICE
AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)**

The undersigned hereby certifies that on this 3rd day of June, 2005, two true and correct copies of the foregoing brief and one disk containing the foregoing brief, were hand delivered to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,986 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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